SUPREME COURT, U. S.
MAY 1 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1703

BOATEL, INCORPORATED,
Petitioner

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

NATIONAL MARITIME UNION OF AMERICA,
AFL-CIO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered February 22, 1974, the judgment entered pursuant thereto, and the orders of that court denying petitioner a rehearing and enforcing the order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported, but is reproduced in Appendix C hereto. The orders of that Court denying a rehearing are not reported, but are reproduced in Appendix D hereto. The Direction of Election of the Regional Director, Region 15, of the National Labor Relations Board is unreported, but is reproduced in Appendix A hereto. The Decision and Order of the National Labor Relations Board is reported at 204 NLRB 137.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 18, 1974 and the orders denying a rehearing were entered on April 3, 1974. The mandate has been stayed to May 17, 1974 pending the filing of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Rule 19.1 (b).

QUESTIONS PRESENTED

1. Whether local Rule 18 of the United States Court of Appeals for the Fifth Circuit, when applied to a case of this nature, denying to petitioner the right to be heard orally, is a departure from accepted and usual course of judicial proceedings representing a denial of due process to the petitioner.

2. Whether stewards, who are the only employees of petitioner exercising supervisory authority on offshore drilling rigs, hundreds of miles from and often without

communication with any supervisor, are supervisors as defined by Section 2(11) of the National Labor Relations Act as amended.

STATEMENT

Petitioner is engaged in furnishing food catering and housekeeping services to corporations with offshore oil drilling rigs in the Gulf of Mexico. It provides cooking and janitorial service for oil company employees who operate and live on these offshore oil drilling platforms and at the time of the representation hearing, had 70 contracts with major oil companies with rigs housing from five to 200 oil company crewmen. Petitioner's crews vary from one to 19 and work fourteen days on and seven days off duty in a very remote area.

Petitioner employs two area supervisors to supervise all of its employees offshore and they visit each rig monthly.

The man in charge of petitioner's employees, in all respects, is the steward, who has authority to terminate, transfer, settle disputes, promote, and discipline petitioner's employees on the rig, without prior communication with petitioner's office. The oil company's foreman on the drilling platform is the platform supervisor and in overall charge of the rig. As the representative of the customer of petitioner, the oil company foreman can cause anyone to be transferred off of his rig, even employees of petitioner, by complaining to the office of petitioner.

On August 24, 1972, the National Maritime Union filed a petition with the National Labor

Relations Board, 15th Region, requesting that an election be held among all of petitioner's offshore employees. At a hearing on the petition on September 12, 1972, petitioner contended that the stewards were supervisors within the meaning of the Act and should, therefore, be excluded from the unit. The Regional Director decided that the stewards were not supervisors and directed an election.

Following the Regional Director's decision, the National Labor Relations Board denied petitioner's request for review and after the election on December 21, 1972,which the union won, the Regional Director certified the union as the exclusive bargaining representative.

After the union certification on January 3, 1973, the union requested petitioner to bargain collectively. Petitioner refused to bargain and on January 10, 1973, the union filed a charge with the National Labor Relations Board. On January 31, 1973, the Board issued a complaint alleging that petitioner was in violation of Section 8(a) (5) and (1) of the National Labor Relations Act as amended, (29 U.S.C. 151, et seq.), by reason of its refusal to bargain. On February 20, 1973, petitioner filed its Answer, admitting its refusal to bargain, but offered affirmative defense that the stewards were supervisors. Thereafter, the General Counsel for the National Labor Relations Board filed with the Board a Motion for Summary Judgment. On March 5, 1973, petitioner filed its opposition to such motion. The National Labor Relations Board granted the Motion for Summary Judgment and concluded that petitioner's refusal to bargain with the union violated Section 8(a) (5) and (1) of the Act.

The National Labor Relations Board then filed Application for Enforcement of the Order with the United States Court of Appeals for the Fifth Circuit. Petitioner opposed the application and timely filed its Brief praying that the Petition for Enforcement be denied, that the election be set aside, and the Court order the National Labor Relations Board to conduct a new election with an appropriate unit.

On February 14, 1974, the United States Court of Appeals for the Fifth Circuit, acting pursuant to its local Rule 18, transferred this case to the "summary calendar for disposition". On February 22, 1974, the United States Court of Appeals for the Fifth Circuit enforced the order of the National Labor Relations Board, per curiam, citing local Rule 18 and 21, together with three decisions of the United States Court of Appeals for the Fifth Circuit.

On March 19, 1974, petitioner filed a Petition for Rehearing and Petition for Rehearing En Banc setting forth that from the very inception of this controversy, petitioner had never been afforded the opportunity to be orally heard and that since the United States Court of Appeals for the Fifth Circuit was the last tribunal to offer oral argument, the use of the summary calendar denied petitioner its opportunity to be heard. Petitioner further stated that the decision leaves all of its employees without supervision except for one day per month.

On April 3, 1974, the United States Court of Appeals for the Fifth Circuit denied the Petition for Rehearing and the Petition for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Fifth Circuit should be reviewed because petitioner has not, at any stage of the litigation, been afforded the right to argue orally and the Court of Appeals for the Fifth Circuit, being the last tribunal with authority to hear the case, can not transfer same to its summary calendar and summarily decide same. Such action is a departure from the accepted and usual course of judicial proceedings, a violation of due process, as to call for the exercise of this Court's power of supervision.

The summary decision is in conflict with the applicable decisions of this Honorable Court, particularly the recent decision of N.L.R.B. v. Textron, Inc., No. 72-1598, decided April 23, 1974, 85 LRRM 2945, interpreting Section 2(11) of the National Labor Relations Act, (29 U.S.C. 151, et seq.), and leaves petitioner's employees without any supervision whatsoever except for one day per month.

1. Use of Summary Calendar in this case.

The Court of Appeals for the Fifth Circuit entered its one word disposition referring to its local Rule 21 and the case of N.L.R.B. v. Amalgamated Cloth. Wkrs. of Amer., AFL-CIO, 430 F.2d 966 (C.A. 5th 1970). The first footnote in the Amalgamated Cloth. Wkrs. of Amer. case states "the instant case is a run-of-the mill Board order . . .". We submit that the instant case is not a run-of-the mill case and the decision virtually affects the entire oil industry and leaves all catering personnel on oil offshore rigs without supervision.

The only trial in this case was before a "hearing officer", but he did not make the decision. Decisions in this case have been by the Regional Director, the National Labor Relations Board, and the United States Court of Appeals for the Fifth Circuit. Petitioner, in spite of repeated requests, has been denied the right to argue before any of these tribunals or persons possessing authority to make decisions.

The law does not provide for and there is no way to obtain judicial review of a unit determination. The only way is for the employer to refuse to bargain, thereby forcing a charge that the employer violated Section 8(a) (5) of the Act.

The National Labor Relations Board utilized its summary judgment procedure under its regulations, Sections 102.67 (f) and 102.69 (c). This forces the Courts of Appeals to review the unit determination but the United States Court of Appeals for the Fifth Circuit did not do so. The considerations governing review on certiorari in Rule 19 of the rules of this Honorable Court indicate that this Court will grant certiorari "where a Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision". Certainly, the denial of the basic right to argue a case falls within this description.

In United States v. Kelly, 349 F.2d 720, (C.A. 2nd 1965), the Court held that defendant's counsel had been permitted to argue orally, therefore, there was no denial of procedural due process. The contention there was that counsel was cut off of oral argument; here, counsel has not been permitted

any oral argument.

In Link v. Wabash Railroad Company, 37 U. S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), the Court said:

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

In Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265, 69 S.Ct. 1097, 93 L.Ed. 1353 (1949), the Court said:

> "On the contrary, due process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, Londoner v. Denver, 210 US 373, 52 L ed 1103, 28 S Ct 708, in others that argument submitted in writing is sufficient. Morgan v. United States, 298 US 468, 481, 80 L ed 1288, 1295, 56 S Ct 906. See also Johnson & Wimsatt v. Hazen, 69 App DC 151, 99 F2d 384; Mitchell v. Reichelderfer, 61 App DC 50, 57 F2d 416.
>
> "The decisions cited are sufficient to show that the broad generalization made by the Court of Appeals is not the law. Rather it is in conflict with this Court's rulings,

in effect, that the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only "insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction.

"Without in any sense discounting the value of oral argument wherever it may be appropriate or, by virtue of the particular circumstances, constitutionally required, we cannot accept the broad formula upon which the Court of Appeals rested its ruling. To do so would do violence not only to our own former decisions but also, we think, to the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind.

" It follows also that we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument. That is not a matter, under our decisions, for broadside generalization and indiscriminate application.

> It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them. Only thus may the judgment of Congress, expressed pursuant to its power under the Constitution to devise both judicial and administrative procedures, be taken into account. Any other approach would be, in these respects, highly abstract, indeed largely in a vacuum."

This Honorable Court in United States v. Florida East Coast Railroad Company, 410 U.S. 224, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973), clarified the applicability of the Fifth Amendment to oral argument. The Court said:

> "The basic distinction between rule-making and adjudication is illustrated by this Court's treatment of two related cases under the Due Process Clause of the Fourteenth Amendment. In Londoner v. Denver, cited in oral argument by appellees, 210 US 373, 52 L Ed 1103, 28 S Ct 708 (1908), the Court held that due process had not been accorded a landowner who objected to the amount assessed against his land as its share of the benefit resulting from the paving of a street. Local procedure had "accorded him the right to file a written complaint and objection, but not to be heard orally. This Court held that due process of law required that he "have the right to support his allegations by argument however

brief, and, if need be, by proof, however informal." Id., at 386, 52 L Ed 1103. But in the later case of Bi-Metallic Investment Co. v. State Board of Equalization, 239 US 441, 60 L Ed 372, 36 S Ct 141 (1915), the Court held that no hearing at all was constitutionally required prior to a decision by state tax officers in Colorado to increase the valuation of all taxable property in Denver by a substantial percentage. The Court distinguished Londoner by stating that there a small number of persons "were exceptionally affected, in each case upon individual grounds." Id., at 446, 60 L Ed 372.

"Later decisions have continued to observe the distinction adverted to in Bi-Metallic Investment Co., supra. In Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 US 292,304-305, 81 L Ed 1093, 57 S Ct 724 (1937), the Court noted the fact that the administrative proceeding there involved was designed to require the utility to refund previously collected rate charges. The Court held that in such a proceeding the agency could not, consistently with due process, act on the basis of undisclosed evidence that was never made a part of the record before the agency. The case is thus more akin to Louisville & Nashville R. Co., supra, than it is to this case. FCC v WJR, 337 US 265, 93 L Ed 1353, 69 S Ct 1097 (1949), established that there was no across-the-board constitutional right to oral argument in any administrative proceeding regardless of its nature.

> While the line dividing them may not always be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."

The proceedings before the National Labor Relations Board and the United States Court of Appeals for the Fifth Circuit were designed to adjudicate disputed facts and certainly, at some stage, petitioner should have been afforded the right to argue orally.

2. Petitioner's Employees Classified as "Stewards" are Clearly Supervisors Under the Act.

In addition to its local rule, the Court of Appeals for the Fifth Circuit cited the following cases:

N.L.R.B. v. Houston Natural Gas Corp., 478 F.2d 467 (5th Cir.), cert. denied, _____ U.S. _____, _____S.Ct. _____, _____L.Ed.2d _____(#73-481, Dec. 3, 1973); Ross Porta-Plant, Inc. v. N.L.R.B., 404 F.2d 1180 (5th Cir. 1968); and N.L.R.B. v. American Cable Systems, Inc., 414 F.2d 661 (5th Cir. 1969), cert. denied, 400 U.S. 957, _____S.Ct. _____, _____L.Ed.2d _____(1970).

The above cases are clearly not controlling and are not even applicable to the facts in the instant case. The employees in those cases all had direct and immediate supervision by some company representative. The employees in the cases cited by the Court could

not and did not fire, lay off, transfer, promote or discipline those employees under them. The National Labor Relations Board adopted the findings of fact of the Regional Director and both found that petitioner's stewards possessed and actually exercised all of these supervisory powers, but they decided that the percentage of supervisors to other employees would be too great.

The Company Employee Guide defines the duties of the steward as follows:

> "II. (d) Steward:
>
> The steward is the Supervisor on the job. His duties include that of cooking, personnel management, including work scheduling, personnel recommendations and terminations, payroll administration, taking inventory, requisitioning (ordering) groceries, customer relations, food and labor cost consciousness."

The Board and the Regional Director found the following:

> "There is no question that the steward or relief steward is the employee of highest "rank and authority" for Employer on each rig at any particular time."
>
> "The testimony reveals that the steward is the "number one" Boatel employee on any rig."
>
> "If an employee is "terminated" because of a customer complaint or by the judgment of a steward, the Employer's personnel manager will

normally give him a chance to work in another crew. If he does not work out on the second crew, either because of the customer or the steward, the personnel manager will "actually completely sever the man from Boatel"."

"The record indicates that some stewards have utilized termination reports vigorously. Other have used them only in cases of complaints from customers."

"If disputes arise on the rig, either between Boatel employees and rig employees or among Boatel employees themselves, the steward will assist in settling such a dispute. In the first instance, he will talk it over with the platform supervisor and attempt to work the matter out. In the second, he will attempt to make the adjustment himself. Such disputes are usually of a personal nature, often perpetrated by the closeness and confinement of quarters and the length of time these men spend on the rig together."

"As to promotions, steward have on occasion given utility men jobs as night cooks and bakers which caused their pay to be raised."

"Discipline on these rigs is a coordinated effort between the platform supervisor and the steward. The Boatel steward has some authority to insure that his employees perform their assigned tasks by removing employees from

the rig or threatening to do so." (Emphasis Added)

In Jas. H. Matthews & Co. v. N.L.R.B., 354 F.2d 432 (C.A. 8th, 1966), the Court said on Page 436:

> "On the basis of our analysis of the record, we are of the opinion that the Board's determination that such leadmen are in fact supervisors has both the necessary warrant in the record and a reasonable basis in law. Of controlling importance is the testimony that the leadmen assign work to the employees in their departments; transfer employees from job to job, as necessary in their sole opinion; pass on employee requests for time off; effectively recommend discipline; and oversee the other employees' work, as well as checking its quality.
>
> "Finally to be noted is the fact that if the leadmen were not supervisors, Factory Foreman Landis would have to exercise detailed supervision over some thirty-seven employees in the departments"involved in a variety of tasks and handling products at many stages of completion in the production process. The unlikelihood of that situation occurring was properly considered.

If the stewards are not supervisors, then the Personnel Manager and two other supervisors must supervise 70 rigs, hundreds of miles apart, with 240 employees aboard at any one time.

In Vega v. N.L.R.B., 341 F.2d 576 (C.A. 1st, 1965), the Court said:

> "In this case we regard it as of considerable importance that if the petitioners were not supervisors the company's employees were entirely without supervision a large part of the time. Cf. N.L.R.B. v. Supreme Dyeing and Finishing Corp., 1 Cir., 1965, 340 F.2d 493. In such circumstances it was not unreasonable to conclude that even the relatively small amount of supervisory power conferred upon an exercised by petitioners made them representatives of the employer."

CONCLUSION

In conclusion, we say that irrespective of the increased number of cases filed in the United States Court of Appeals for the Fifth Circuit, the answer to justice is not a summary calendar. Ten years ago, there were eight active judges sitting on the Fifth Circuit Court of Appeals. Today, there are fifteen active and four senior judges.

The attorney owes his client a very important duty, that is, to prepare, research and brief the case to its fullest extent. The Court owes that attorney and his client a few minutes, irrespective of a crowded docket. This is particularly true in the instant case where the attorney has never had opportunity to be heard.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari

should be granted to review and reverse the decision and judgment of the United States Court of Appeals for the Fifth Circuit.

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PROOF OF SERVICE

In furtherance of the Rules, I have served three copies of the above and foregoing petition for writ of certiorari upon Mr. Elliott Moore, National Labor Relations Board, Washington, D.C., Mr. Charles M. Paschal, Jr., National Labor Relations Board, Region 15, Plaza Tower Building, Suite 2700, 1001 Howard Avenue, New Orleans, Louisiana 70113 and Mr. Abraham E. Freedman, 346 West 17th Street, New York, New York, by depositing same in the United States mail, postage prepaid.

New Orleans, Louisiana, May _____, 1974.

_____

APPENDIX A

FORM NLRB-4477
(6-71)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BOATEL, INCORPORATED
Employer

and

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO
Petitioner

CASE NO. 15-RC-4981

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 1/

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 2/

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: 3/

All employees of Employer employed in the offshore oil industry through its Belle Chasse, Louisiana, offices, including utility men, night cooks and bakers, stewards and relief stewards 4/; excluding all other employees, office clerical employees, guards and supervisors 5/as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. 6/ Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by NATIONAL MARITIME UNION OF AMERICA, AFL-CIO.

Dated October 24, 1972

at New Orleans, Louisiana

/s/ Charles H. Paschal, Jr.

Charles H. Paschal, Jr.
Regional Director, Region 15

1/ Boatel, Incorporated (herein called Boatel or Employer) is a Delaware corporation with a principal office in Belle Chasse, Louisiana, from which it is engaged in furnishing food catering and housekeeping services to corporations with offshore oil drilling rigs in the territorial waters of the States of Mississippi and Louisiana and beyond in the Gulf of Mexico. These corporations include, inter alia, Shell Oil Company and Chevron Oil Company. During the past twelve months, Employer has received approximately $5,000,000 for services performed for these corporations and during the same period, Employer has received goods and supplies in a substantial dollar amount directly from points located outside the State of Louisiana. Based on the above, the parties stipulated that the Employer is engaged in commerce within the meaning of the Act.

2/ The parties stipulated, and I find, that National Maritime Union of America, AFL-CIO (herein called Petitioner) is a labor organization within the meaning of Section 2(5) of the Act.

3/ Petitioner seeks a unit of "all offshore employees" of the Employer, to include all utility men, night cooks and bakers and stewards and relief stewards. The record reflects that there are approximately 168 utility men, 20 night cooks and bakers, and 112 stewards and relief stewards employed by this Employer, a total of about 300 employees. The parties stipulated that the utility men and night cooks and bakers should be included in the unit. Contrary to Petitioner, however,

(Continued on page 2)

3/ (Cont'd) Employer would exclude from any unit found appropriate the stewards and relief stewards. Thus, the only issue left for resolution herein is the unit placement of the stewards and relief stewards.

4/ Employer services oil rigs of various sizes. In so doing, they utilize crews which range in size from one to eighteen or nineteen employees. There are approximately five or six rigs which Employer services with a one-man crew, ten rigs serviced with two-men crews, ten to fifteen rigs serviced with three-men crews, about thirty-five rigs with four-men crews, and about five rigs with crews of more than four of Employer's employees. The Employer services one large rig and utilizes some eighteen or nineteen men in the crew on this particular job, but otherwise its crews are generally limited to from one to six men.

Where a one-man crew is used, the one man is classified as a steward. Where two or more men are included in the crew, Employer will utilize one steward and a further complement of utility men and night cooks and bakers as required to perform the cooking and housekeeping duties they are hired by the customer to provide. The normal practice in the offshore drilling industry is for employees to work 14 days on the rig and then take seven days off. Thus, on the seven days the steward is off, his duties are assumed by a relief steward. The relief steward may be a utility man or night cook and baker from the same rig, or an employee who works only as a relief steward and spends seven days relieving the steward on one rig and then transfers and spends seven days performing steward's duties on another rig.

There is no question that the steward or relief steward is the employee of highest "rank and authority" for Employer on each rig at any particular time. However, the company doing the drilling which is referred to as the customer of Employer, employs a "tool pusher" or platform supervisor who is their rig supervisor and who has control over and is in charge of the entire rig operations. Customer complaints concerning Employer job performance or Employer's employees are made by the "tool pusher" to the Employer's steward. If the complaint concerns an employee of Employer, the "tool pusher" informs the Employer's steward and/or management, and if transfer of the employee is demanded, such transfer is made because it is the contractual obligation of Employer to do so. The procedure followed, normally, is that the steward, after being informed by the platform supervisor that a certain employee is unsatisfactory, "terminates" that employee by filling out a termination report, and then informs the Employer's personnel manager of his action. The personnel manager then dispatches a replacement to the rig. If the steward feels the man is a good employee, he attempts to convince the platform supervisor of this. If he fails to do so, he will recommend to the personnel manager, either in the termination report or by ship to shore telephone or radio, that the employee be transferred to another rig. The personnel manager has absolute authority to overrule any decision made by a steward or relief steward concerning terminations, or other matters and has, in fact, exercised this power. If a steward is not performing his duties to the satisfaction of the platform supervisor, the supervisor will notify the Employer's offices and they will terminate and replace the steward. If an employee is "terminated" because of a customer complaint or by the judgment of a steward, the Employer's personnel manager will normally give him a chance to work in another crew. If he does not work out on the second crew, either because of the customer or the steward, the personnel manager will "actually completely sever the man from Boatel." The personnel manager will also terminate employees in cases where they do not show up for work as scheduled, and do not get to the job on time.

The duties of the steward and the relief steward are set out in the "Boatel Employee Guide", as follows:

(c) Relief Steward:

The Relief Steward acts as the Relief for the Steward or Night Cook and Baker. Some jobs do not have a Night Cook and Baker. The Relief Steward performs the Steward's duties in his absence and is the Unit Supervisor at this time.

(d) Steward:

The Steward is the Supervisor on the job. His duties include that of cooking, personnel management, including work scheduling, personnel recommendations and terminations, payroll administration, taking inventory, requisitioning (ordering) groceries, customer relations, food and labor cost consciousness.

(Continued on page 3)

4/ (Cont'd) Normally, the stewards, when faced with an unsatisfactory employee, will recommend that he be given more experience rather than fired. The Employer's personnel manager testified that the purpose of the termination report filled out by the steward is "to tell the man that his work is not satisfactory and to give the number of hours he has worked." The employee "terminated" is given a copy of the termination report which he brings to the Boatel office where the personnel manager will review it and determine whether or not it is "just". The personnel manager does not necessarily check with the steward before deciding whether the employee deserved a chance on another rig. The record as a whole indicates that the personnel manager has, and exercises, total authority over whether an employee sent in from a rig by a steward will be given further employment by Employer or will be absolutely terminated from employment.

The record indicates that some stewards have utilized termination reports vigorously. Others have used them only in cases of complaints from customers. Some stewards have been informed that the reports must be completed, witnessed and sent to the Boatel offices, only to verify that they had good cause to send the employee in from the rig.

The termination reports, on their face, can be used for resignations or discharges. The form has a place where the reason for the action may be stated, a signature block, and two places for witnesses to verify the report. Below these items is a place to compute the hours worked by the employee prior to discharge. Beneath this entry is a place for the signature of the employee and the area supervisor as well as blocks for the initials of the operations manager and the personnel and payroll departments. The understanding of the purpose of the termination reports was somewhat varied in the estimations of the witnesses called to testify thereto. It is clear, however, that these forms serve the purposes of terminating the employee and computing the pay owed to him and fulfilling the other company administrative requirements. The Employer's February 25, 1972, newsletter contains a section relating to the purpose of the termination forms. It reads as follows:

> Terminations:
> To reiterate on previously established company policies; whenever an employee is unsatisfactory, having been discharged or he resigns for one reason or another, the termination report is to be completed by the "on the job" supervisor. As the supervisor in charge, you are to be sure that the individual signs this report.
> In order for Boatel to have a better record regarding an employee's termination or resignation, it will be necessary that his report be signed by one or two crew members besides the person in charge. When these cases go to the unemployment division, it is necessary for us to have more than one signature substantiating reasons concerning employee's discharge or resignation. By doing this, it will alleviate our having to make arrangements for you to appear at hearings on your off time. You will be furnished with new termination report forms which will be sent directly to the job. BE SURE TO THROW YOUR OLD FORMS AWAY! The new form indicates a place for other crew members to witness the transaction.

A later newsletter, dated April 7, 1972, contains further instructions on terminations. It is stated there that:

> The Steward or Relief Steward is to make up a termination slip on a Unit and have the man sign same before coming in. There have been several occasions where a phone call has been placed to the office after the man has made the crew break to advise that they do not want him back. It is your responsibility to line the men up on work and see that he can be trained. If not possible, let him know that he is not qualified for the job or is not satisfactory, make out the slip on him and send it into the office so the man will know where he stands. This is in conformity with Governmental Agency regulations recently instituted.

The termination reports are witnessed, indiscriminately, by either Boatel employees or employees of the customer. The witnesses sign the report to verify that the employee has, in fact, committed the transgression of which he is accused. One steward testified that he was told that if his termination report was not witnessed, it was not "worth the paper it was written on," and

(Continued on page 4)

4/ (Cont'd) that the purpose of having termination reports written was to witness the fact that the employee is not being sent in from the rig "for a personal reason."

The record shows that stewards and relief stewards have terminated employees in the past and in doing so complete the termination reports. One copy of the report is given to the employee and another is mailed to the Employer's personnel department. The steward also informs the Employer's personnel department of the termination via ship to show communication in virtually all cases.

The terminated employee will take his copy of the termination report to the Employer's main office in Belle Chasse. He will there receive payment for the hours worked during that pay period. The employee will talk to the personnel manager who will determine whether or not the termination is "just" by the slip and by conversations with the employee himself.

There is no question but that all hiring of employees is done on shore. The stewards can, and do, recommend the hire of employees, and these recommendations are in some instances followed by Employer. Some recommendations for hiring by stewards have been denied. Other unit employees, however, have, and do, exercise the same degree of effectiveness in recommendations for hiring of new employees.

The stewards spend from 75 to 95 percent of their time cooking. They spend their other time filling out food requisitions and orders, time sheets, and inventories or spot checking to assure the job is done and browsing around to see if the men on the rig are satisfied with the way that it is kept and the cooking is done. The stewards prepare menues for the meals from a 21-day revolving master menu suggested by the Employer. The steward adjusts this menu, based on the requests and desires of the rig employees he feeds and the stores and groceries available to him. Stewards do have authority to vary the menu under such circumstances.

The stewards are all trained and skilled cooks. They are paid from $2.35 to $2.50 per hour. The other employees are also paid on an hourly basis. The night cooks and bakers usually do the cooking for night meals and bake the bread needed for the next day. They are paid about $2.20 per hour. The utility men, who are responsible for general housekeeping chores, make about $1.90 per hour. All other employees of Employer are paid by monthly salary.

The stewards may allow other employees to leave and be absent from the rig in "emergency" situations. The steward will report such an absence to the Employer's personnel manager. There is no evidence that a steward has ever exercised any authority to deny an employee time off under any circumstances.

If disputes arise on the rig, either between Boatel employees and rig employees or among Boatel employees themselves, the steward will assist in settling such a dispute. In the first instance, he will talk it over with the platform supervisor and attempt to work the matter out. In the second, he will attempt to make the adjustment himself. Such disputes are usually of a personal nature, often perpetrated by the closeness and confinement of quarters and the length of time these men spend on the rig together. If a platform supervisor has such a dispute with a steward, he can, and does, require the Employer to remove the steward, and sometimes his entire crew, from the rig and replace it with another crew. This is done through the Employer's personnel manager.

Employees are hired by Boatel for the jobs they are qualified to do. They are assigned to crews by the Boatel onshore officials. A steward may request a certain employee for his crew, but it does not appear that he can make such an assignment. Where a crew is a man short because of a termination, resignation, or an emergency departure, the steward notifies Boatel who assigns a replacement. It is evidenced that a steward passed on an employee's request to be transferred to a job closer to his home to Boatel officials who complied with this request.

As to promotions, stewards have on occasion given utility men jobs as night cooks and bakers which caused their pay to be raised. They report this change to the Boatel offices. The record discloses that on one occasion, when Employer had transferred a night cook and baker to another rig, the steward took his utility man who was able to cook and made him night cook and baker. The testimony indicates that the Boatel personnel officials must be consulted to approve these promotions and that they retain the right to veto any such promotions. Another steward says he can suggest promotions but cannot promote without clearance from the personnel department.

(Continued on page 5)

4/ (Cont'd) Discipline on these rigs is a coordinated effort between the platform supervisor and the steward. The Boatel steward has some authority to insure that his employees perform their assigned tasks by removing employees from the rig or threatening to do so. The record also discloses that a great number of these actions are undertaken at the request of the platform supervisor. The stewards have been instructed that in cases of customer complaints, including those whereby a customer seeks the removal of a Boatel employee from a rig, that the customer is always right. Therefore, the Boatel stewards accede to virtually all customer demands, including those concerning matters of termination and discipline.

The employees on the rig work on basic 12-hour shifts. The night cook and baker normally performs his duties at night when the steward is not busy in the kitchen. The utility men will normally perform their housekeeping chores from six until six unless the platform supervisor and the steward determine that because of the hours being worked by the men on the rig, another schedule will be more effective. Timekeeping on the rig is a basic function of the steward but this job is accomplished by a routine entry that each employee worked 12 hours on the given day. The only exception to this routine appearing from the record is that when an employee is sent in from the rig, he is only credited with the actual hours worked on the day of his termination. The steward keeps his own time as well as that of the others in his crew.

Overtime work seems to be authorized under some of the contracts between Boatel and its customers. In cases where it can be authorized, said authorization is signed by the platform supervisor and the steward.

Most of the duties done by all Boatel employees on a rig, including the steward and the relief steward, are routine and do not require specific or detailed instructions. The stewards have authority to direct a night cook and baker or utility man to accomplish a specific task which has been left undone, but the platform supervisor appears to do the normal inspection which reveals the error and the message is relayed to the offending employee by the steward.

"The term supervisor is defined in Section 2(11) of the Act by the authority an individual has over other employees. Possession of any one of the authorities listed in the section places the employee invested with such authority in the supervisory class, provided that the exercise of the authority is not of a merely routine nature, but requires the use of independent judgment." Warren Petroleum Corporation, 120 NLRB 370, 378 (1958).

Employer contends that the stewards and relief stewards possess, to some degree, all of the authorities set out in the Act. The Petitioner contends that "it is clear that the steward does not have authority to transfer, suspend, lay off, recall or reward employees or effectively recommend such action," but admits that there is some evidence that stewards have authority to hire, promote, discharge, assign, discipline and adjust grievances of other employees or to effectively recommend such action which supports Employer's position.

The Employer's legal arguments center around its contention that, absent a steward, there would be no Boatel employee present to effectively direct the work of the other Boatel employees, citing Rafael Vega v. N.L.R.B., 341 F. 2d 576, 58 LRRM 2439 (C.A. 1, 1965); and, Mon River Towing, Inc., 173 NLRB 1452 (1969). The Petitioner adheres, in main, to the argument that the ratio of stewards to rank and file employees belies the contention that they are in fact possessed of supervisory authority and that the stewards spend the greatest amount of their time doing the work of an employee rather than supervising other employees. Petitioner cites several cases in support of these contentions.

The evidence divulges that there is a very unique operational situation involved in this case. The Boatel function on the rigs is to service, provide for and please the employees of various employers on the rigs. In doing so, all their employees, including stewards, answer, almost entirely, to the platform supervisor employed by the customer. The platform supervisor inspects the work of all Boatel employees. All Boatel employees, including the stewards, can be sent off the rig at the request of the platform supervisor. This obligation is established by the contracts between Boatel and its customers. The steward, in matters which become rig disputes, is often a conduit between the platform supervisor and the Boatel employees and, as such, passes along instructions, complaints and demands from the platform superintendent.

(Continued on page 6)

4/ (Cont'd) The testimony reveals that the steward is the "number one" Boatel employee on any rig. It is also clear that his authorities are subordinate to those of the platform supervisor employed by the customer and that the platform supervisor has substantial control over all the employees on the rig, including the Boatel employees. / It is further clear that the steward's authority in regard to termination is subject to the final scrutiny of the Boatel personnel manager. Absent the personnel manager's determination, after an independent investigation, that the termination was "just", the action taken by sending an employee in from a rig is only tantamount to a suggested transfer. This is true because it appears that only on one occasion out of those specifically alluded to in the record was there evidence that an employee sent in from a rig with a "termination report" was actually discharged by the personnel manager. All others were employed by Boatel on other rigs. The employee terminated was terminated on the basis of the independent judgment of the personnel manager and because he had repeatedly reported to work under the influence of alcohol.

The key to the Board's decision in Mon River Towing, Inc., supra, wherein a boat captain was found to be a supervisor, was its adoption of the Trial Examiner's finding that "[i]t is inconceivable that employees on an around-the-clock operation for several days (or even, on occasion, weeks) at a time would be left without present supervision." The facts herein are inapposite because of the very substantial authority exercised by the Boatel customer's platform supervisor in regard to all Boatel employees, including the steward.

Although the steward fills out "termination reports", the record as a whole indicates that these are administrative matters and the terminations themselves are tantamount to mere recommendations for transfer subject to finalization by the Boatel personnel manager. There were limited proven instances of promotions having been made by the stewards, but each of these personnel actions was finally approved by the Boatel main office.

Finally, the stewards, although responsible to direct the work of their fellow employees under the close direction of, and cooperation with, the platform supervisor, perform this direction within the confines of set working hours and routine duties. The tasks of cooking and housekeeping require little, if any, of the independent judgment contemplated by the Act. Further, the stewards spend from 75 to 90 percent of their time performing their own cooking duties, and the remainder of the time preparing routine reports. The night cook and baker performs substantially the same duties on the night shift without any immediate supervision as does the night utility man on a four-man rig.

The ratio of stewards to other unit employees is one to about one and a half overall. (There are 112 stewards and 188 other employees.) On 65 of the 70 rigs involved, the largest ratio is one to four and on five or six rigs, the steward works alone. The wage rate of the steward is from 45-cents to 60-cents more than that of a utility man but only a dime to a quarter more than that of a night cook and baker.

Under these circumstances, and under all the evidence it is not established that the stewards and relief stewards have the supervisory authority contemplated by Section 2(11) of the Act. In the recent case of Commercial Fleet Wash, Inc., 190 NLRB No. 63 (1972), the Board ruled that certain leadmen were not supervisors of car washing crews. The criteria therein used were, as follows: (1) the routine nature of the work and work assignments and lack of exercise of independent judgment in relation thereto; (2) the low ratio of alleged supervisors to non-supervisory personnel; (3) the fact that the alleged supervisors spend 80 to 90 percent of their time working as part of the crew. This decision was reached notwithstanding the fact that the leadmen were the highest officials of the employer on each job and that the record indicated authority of leadermen to effectively recommend transfers and promotions and to lay off employees pending investigation of the leaderman's allegation that they were guilty of theft.

I find, especially based on the small steward to utility and night cook and baker ratio, the fact that stewards spend 75 to 90 percent of their time performing cooking work, the lack of independent judgment they exercise in directing the routine tasks performed by other unit personnel and the substantial authority exercised by the platform supervisor and Boatel personnel

(Continued on page 7)

4/ (Cont'd) manager over the unit personnel, that despite their possession of certain limited authorities and discretion in relation to recommendation for transfer, promotion, time off in emergencies and termination, stewards and relief stewards do not possess sufficient indicia of authority to be classified as supervisors within the meaning of the Act. I will include them in the unit.

5/ The parties stipulated that the two area supervisors possess substantial indicia of supervisory authority and are supervisors within the meaning of the Act. I so find and, therefore, exclude them from the unit.

Employer employs two "executive stewards" on its large job. These stewards do not do any cooking, but are solely involved in personnel administration, ordering stores and inspecting and directing the work of the 18 Boatel employees employed on this rig. The parties stipulated these these two employees are supervisors within the meaning of the Act. Based on the above, and the entire record, I find the executive stewards to be supervisors within the meaning of the Act, and they are, therefore, excluded from the unit.

6/ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236; N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office, Plaza Tower Building, Suite 2700, 1001 Howard Avenue, New Orleans, Louisiana 70113, on or before October 31, 1972. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies.

APPENDIX B

NLRB - ORDER SECTION

11/20/72 10:25 a.m.

RV:bjw 49326

Sidney W. Provensal, Jr., Esq.
Provensal & Fitzmaurice
1014 Whitney Bldg.
New Orleans, Louisiana

Edward M. Katz, Esq.
36 Seventh Ave.
New York, New York

NLRB - Region 15
New Orleans, Louisiana

RE: BOATEL, INCORPORATED, 15-RC-4981, EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD:

Robert Volger
Deputy Executive Secretary

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-3086
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

BOATEL, INCORPORATED,

Respondent.

Application for Enforcement of an Order of
The National Labor Relations Board (Louisiana Case)

(February 22, 1974)

Before GEWIN, GODBOLD and CLARK, Circuit Judges.

PER CURIAM:

ENFORCED. See Local Rule 21;[1/] N.L.R.B. v. Houston Natural Gas Corp., 478 F.2d 467 (5th Cir.), cert. denied, ___U.S. ___, ___S.Ct. ___, ___ L.Ed.2d ___ (#73-481, Dec. 3, 1973); Ross Porta-Plant, Inc. v. N.L.R.B., 404 F.2d 1180 (5th Cir. 1968); see also N.L.R.B. v. American Cable Systems, Inc., 414 F.2d 661 (5th Cir. 1969), cert. denied, 400 U.S. 957, ___S.Ct. ___, ___ L.Ed.2d ___ (1970).

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* Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y., 431 F.2d 409, Part I (5th Cir. 1970).

1/ See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966, (5th Cir. 1970).

APPENDIX D

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK
600 CAMP STREET
NEW ORLEANS, LA. 70130

April 3, 1974

TO ALL COUNSEL OF RECORD

Re: No. 73-3086 - NLRB v. Boatel, Inc.

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Annie L. Brown
Deputy Clerk

cc: Mr. Elliott Moore
Mr. Charles N. Paschal, Jr.
Mr. Abraham E. Freedman
Mr. Eldon E. Fallon
Messrs. Sidney W. Provensal, Jr.
Robert E. Rougelot

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 73-3086
BOATEL, INCORPORATED, Respondent.	)	

JUDGMENT

Before: GEWIN, GODBOLD and CLARK, Circuit Judges.

THIS CAUSE was submitted to this Court upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Boatel, Incorporated, its officers, agents, successors, and assigns on July 10, 1973. The Court, having determined the case approoriate for summary disposition without oral argument, on February 22, 1974, handed down its opinion granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Boatel, Incorporated, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: MAR 18 1974